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ABSTRACT

This article reviews some of the First Amendment issues that school boards and their legal counsel often encounter during a school board meeting. The discussion necessarily begins with a brief review of the public forum doctrine, under which is included the traditional public forum, the designated public forum, and the nonpublic forum. The article discusses the school board meeting as a public forum. In a designated public forum, school boards must be wary of three types of content-based exclusions: criticism of school officials, selection of subjects, and selection of speakers. The article also lists time, place, and manner restrictions. The presiding officer and members of a school board should understand that, if the public is invited to comment upon an agenda item or any matter within the school district's jurisdiction, a public forum is created. In a public forum, the school board can request patrons to use alternative channels to criticize school employees, but a prohibition on such comments is invalid. Rules that exclude narrow categories of speakers or subjects are also suspect and should be avoided. The issue also includes case notes concerning free speech, religion, special education, employment rights, Equal Access Act, and vouchers. Supreme Court decisions are reviewed as well. (DFR)

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School Board Meetings and the First Amendment

THOMAS W. PICKRELL
ARIZONA SCHOOL BOARDS ASSOCIATION
PHOENIX, ARIZONA

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Whether by statute or by custom, a school board meeting is often a forum that invites public discourse. The open meeting or "sunshine" laws enacted by all fifty states allow the public to attend school board meetings. In some states, these statutes give citizens the additional right to speak on agenda items or other matters within the school board's jurisdiction. In most other states, school boards invite direct public participation by their own policies.

School board meetings, therefore, are often the focus of important governmental and individual interests. A school board meeting, like the meeting of a city council or other public body, is fundamentally "a government process with a government purpose." *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990). At the same time, the school board that by law or policy opens a segment of its meeting to public comment actuates the First Amendment right of its citizens to use the forum to communicate their concerns about their school system.

As those who regularly attend school board meetings know, the public comment segment often illustrates democracy at its best and its worst. Meeting structure must be maintained so that the board can fully address and deal with its agenda:

> Public meetings inevitably attract a goodly number of garrulous people. Many of them are crucial to robust debate. At times, however, even the champions of democracy need to be ruled out of order on the merciful march to adjournment.

Collinson v. Gott, 895 F.2d 994, 1006 (4th Cir. 1990)(Wilkinson, C.J., concurring).

Of equal concern is the presiding officer of a school board who does not understand how the First Amendment limits the parliamentary power that he or she wields. School boards need sound policies that help their presiding officers avoid violating First Amendment rights in pursuit of an orderly and efficient meeting.

This article will review some of the First Amendment issues that school boards and their legal counsel often encounter during a school board meeting. The discussion necessarily begins with a brief review of the public forum doctrine.

PUBLIC FORUM DOCTRINE

The extent to which the government can regulate expressive activity on public property depends upon the character of the property in question. For First Amendment purposes public property falls into three categories. The government's regulatory power, as limited by the First Amendment, varies with each category. *See generally Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 677 (1998).

Traditional Public Forum

The State's power to regulate expression is most limited in the traditional public forum. Into this first category fall streets, parks and other public places that throughout American history have been used "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In a traditional public forum a content-based exclusion must be narrowly drawn to effectuate a compelling state interest. Content neutral, narrowly tailored regulations of the time, place and manner of expressive activities are permitted if they serve a significant government interest and leave open alternative channels of communication.

Designated Public Forum

The second category is the designated public forum—"public property which the State has opened for use by the public as a place for expressive activity." *Perry*, 460 U.S at 45. "To create a forum of this type, the government must intend to make the property 'generally available to a class of speakers.'" *Forbes*, 523 U.S. at 679 (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)). The State's regulation of a designated public forum is limited by the First Amendment to the

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same extent as the traditional public forum. "If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny." *Id.* at 677.

Nonpublic Forum

Finally, public property that is not by tradition or designation a forum for public communication is "either a nonpublic forum or not a forum at all." *Id.* The State, "like a private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 390 (1993). Furthermore, it need not prohibit all public communication to maintain its property as a nonpublic forum. Where some public access is permitted, the distinction between a designated public forum and a nonpublic forum turns on the government's intent to allow general access or selective access:

> On the one hand, the government creates a designated public forum when it makes its property generally available to a certain class of speakers... On the other hand, the government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, "obtain permission," to use it.

Forbes, 523 U.S. at 680. When property falls within this third category, expressive activity is subject to any reasonable regulation that serves a significant government interest and that is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

THE SCHOOL BOARD MEETING AS A PUBLIC FORUM

In *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), the Supreme Court invalidated a restriction on non-union employee speech at an open school board meeting, finding that "the State ha[d] opened a forum for direct citizen involvement." Since this 1976 decision, the Supreme Court has cited the open school board meeting in *Madison* as a "quintessential example" of a designated public forum. *Leventhal v. Vista Unified School District*, 973 F. Supp. 951, 957 (S.D. Cal. 1997). *See, e.g., Perry*, 460 U.S. at 45, 46 n.7; *Cornelius*, 473 U.S. at 803. A school board, therefore, that by law or policy gives general access to the public at its meetings to comment upon a specific agenda item or any matter within the board's jurisdiction clearly creates a designated public forum. *See Leventhal*, 973 F. Supp. 951; *Baca v. Moreno Valley Unified Schl Dist.*, 936 F. Supp. 719 (C.D. Cal. 1996).

Although the school board meetings in *Madison* and subsequent cases were found to be public fora, these rulings do not imply that school board meetings are inherently public fora. "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minnesota State Board of Community Colleges v. Knight*, 465 U.S. 280, 283 (1984). Likewise, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 803. School board meetings, therefore, become designated public fora because policy makers—the state legislature or the school board itself—choose to make them so by granting a class of persons general access for the purpose of public comment.

CONTENT-BASED RESTRICTIONS

In a designated public forum, school boards must be wary of three types of content-based exclusions.

Criticism of School Officials

In an effort to protect the reputation, privacy and due process rights of school officials, some school boards have adopted policies that prohibit citizens from publicly criticizing school officials in open school board meetings. Two federal district court decisions from California illustrate how vulnerable such policies are to constitutional challenges.

In California, the Brown Act grants the public the right to speak on any item of interest that is within the subject-matter jurisdiction of the school board. In *Baca v. Moreno Valley Unified School District*, 936 F. Supp. 719, the school board by policy prohibited "charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee." A similar restriction was adopted by the school board in *Leventhal v. Vista Unified School District*, 973 F. Supp. 951.

In each case, the court found that the Brown Act creates a designated public forum and that the district's policy against criticism of school employees was a content-based restriction. The question, thus, became whether the policy was narrowly drawn to effectuate a compelling state interest. The districts presented a variety of reasons for the policy, such as the district's interest in protecting the privacy and liberty interests of its employees and the board's interest in conducting an efficient, orderly meeting. The courts concluded, however that none were sufficiently compelling to justify a ban on employee criticism. In the wake of *Baca* and *Leventhal*, school boards that by law are required to give access for open public comment should not attempt to silence citizens who speak critically of school employees unless their comments, coupled with other behavior, clearly threaten to disrupt the meeting.

Selection of Subjects

For school boards that are not compelled to provide an open forum, *Baca* and *Leventhal* leave a question unanswered: Could a school board lawfully allow public comment but exclude any discussion (pro or con) of employees? In other words, can a school board shape the public forum it designates to avoid subjects that it would rather deal with privately or not at all?

Since the inception of the public forum doctrine, the Supreme Court has recognized that the State may limit communications within a designated public forum to a specific subject or subjects. *See Perry*, 460 U.S. at 46 n.7. Indeed, the Supreme Court stated expressly in *Madison* that a public body may limit public comment to specific agenda items. *Madison*, 429 U.S. at 175 n. 8; *see also Kindt*, 67 F.3d at 270. Whether a school board may do the inverse—allow public comment on anything except a specific subject—may

1. Also, compare White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990) and Jones v. Heyman, 888 F.2d 1328 (11th Cir. 1989) (public comment segments of city council meeting are designated public fora) with Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266 (9th Cir. 1995) (city council meeting is "more akin to a nonpublic forum.").

depend largely upon which standard is used to judge the exclusion of subjects from a designated public forum. The Supreme Court has not reviewed this question.[2]

If a court were to apply the strict scrutiny standard used for content-based regulations in traditional and designated fora, a school board's exclusion of a subject would likely fail under the same analysis that invalidated the bans on employee criticism in *Baca* and *Leventhal*. *See, e.g., Princeton*, 480 F. Supp. at 962. Some courts, however, have concluded that the exclusion of a subject "need only be reasonable and viewpoint-neutral to pass constitutional muster." *See, e.g., Lamb's Chapel v. Center Moriches School Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991), *aff'd*, 959 F.2d 381 (1992), *rev'd on other grounds*, 508 U.S. 384 (1993).[3] *See also Warren v. Fairfax County*, 169 F.3d 190, 200 (4th Cir. 1999)(Murnaghan, J., dissenting). Under this less demanding standard, the exclusion of certain subjects would seem to be a much closer question.

Selection of Speakers

Another form of content-based restriction is a regulation that disqualifies certain individuals from the class of persons granted access to a designated public forum. Policies that prohibit teachers or other school employees from addressing the school board during an open public comment period have been consistently ruled invalid. *See, e.g., Madison*, 429 U.S. at 167, *Westbrook v. Teton County School Dist. No. 1*, 918 F. Supp. 1475 (D. Wyo. 1996); *Princeton Educ. Ass'n v. Princeton Bd. of Educ.*, 480 F. Supp. 962 (S.D. Ohio 1979).[4]

As the public forum doctrine has evolved, however, it has become evident that maintaining a school board meeting as a nonpublic forum or as no forum at all yields significantly greater discretion over speaker selection. Consequently, school boards that wish to retain more control over the selection of the persons who address them may find alternative formats that avoid creating a public forum more suitable to them.

- **Access at Request of Board**

If a school board chooses not to create a public forum, the First Amendment does not limit its authority to determine who, if anyone, is needed to provide information to help it decide policy. For example, a citizen has no constitutional right to address a school board before it adopts a textbook. Likewise, the same citizen cannot demand, on constitutional grounds, equal time to address the school board if it chooses to listen to a curriculum specialist before adopting a textbook. In both situations, no right of access exists because no forum, public or nonpublic, was created. *See Minnesota State Board for Community Colleges*, 465 U.S. at 284.[5]

- **Access at Request of Speaker and by Permission of Board**

If a school board reserves access to a class of speakers, but the members of the class must obtain permission individually from the board to access the forum, a nonpublic forum is created. *Forbes*, 523 U.S. at 680. In a nonpublic forum of this nature, the school board has discretion to exclude members of the class, provided that the exclusion is "'reasonable and . . . is not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Id.* at 678, citing, *Cornelius*, 478 U.S. at 800. Consistent with this standard, a school board could establish a procedure for citizens to request, in advance of the meeting, to be placed on its meeting agenda and for permission to be granted or denied based on content-neutral considerations. *See Dayan v. Board of Regents of Univ. System*, 491 F. Supp. 138 (M.D. Ga. 1979). *See also Leventhal*, 973 F. Supp. at 951.

TIME, PLACE & MANNER RESTRICTIONS

Time, place and manner restrictions must be content-neutral, narrowly tailored to effectuate a significant interest, and allow for alternative channels of communication. Controlling the agenda and preventing the disruption of a meeting are significant government interests. *Jones*, 888 F.2d at 1333; *Collinson*, 895 F.2d at 1000 (Phillips, C.J., concurring). For this reason, public bodies have had little difficulty convincing courts that rules commonly used to maintain order in a public meeting do not violate the First Amendment.

Time Limits

Conserving time and ensuring others have an opportunity to speak are legitimate reasons for imposing a uniform time limit on speakers. *See Collinson*, 895 F.2d at 994 (two minutes); *Kindt*, 67 F.3d at 266 (three minutes); *Jones*, 888 F.2d at 1328 (three minutes).

Repetitious or Irrelevant Comments

In dealing with agenda items, the school board does not violate the First Amendment when it restricts public speaking to the subject at hand. *White*, 900 F.2d at 1425. While a speaker cannot be stopped from speaking because the presiding officer disagrees with the viewpoint he is expressing, he may be stopped if his speech becomes "unduly repetitious" or lapses into an "extended discussion of irrelevancies." *Id; Kindt*, 67 F.3d at 270; *Collinson*, 895 F.2d at 1000.

Disruptive Conduct

Because of a school board's substantial interest in conducting meetings with orderliness and fairness to all, its presiding officer has discretion to stop speech or other conduct that he or she "reasonably perceive[s] to be, or imminently to threaten, a disruption of the orderly

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2. The Supreme Court narrowly avoided reviewing this issue in Lamb's Chapel v. Center Moriches School Dist., 508 U.S. at 391-92. The unsettled nature of this question was recently discussed in Warren v. Fairfax County, 169 F.3d 190, 198-201 (4th Cir. 1999) (Murnaghan, J. dissenting).

3. Although the Supreme Court ultimately reversed the district and court of appeals' rulings, it assumed that the lower courts were correct in rejecting the strict scrutiny standard for speaker or subject exclusions from a traditional or designated public forum. *See Lamb's Chapel*, 508 U.S. at 392.

4. *See also* Henrico Professional Firefighters Ass'n v. Board of Supervisors of Henrico County, 649 F.2d 237 (4th Cir. 1981); Local 2106, Int'l Ass'n of Firefighters v. Rock Hill, 660 F.2d 97 (4th Cir. 1981)(invalidating rule prohibiting firefighter-employees from speaking to municipal board during public comment).

5. Although *Madison* predates the public forum doctrine, Justice Stewart's concurrence emphasizes the authority of a public body to set its own agenda:

> Such a body surely is not prohibited from limiting discussion at public meetings to those subjects that it believes will be illuminated by the views of others and in trying to best serve its informational needs while rationing its time, I should suppose a public body has broad authority to permit only selected individuals—for example, those who are recognized experts on a matter under consideration—to express their opinions.

429 U.S. at 180 (Stewart, J. concurring).

and fair progress of the discussion." *Collinson*, 895 F.2d at 1000. Accordingly, a spectator can be stopped from boisterously commenting upon the deliberations of the board. *See Hansen v. Bennett*, 948 F.2d 397 (7th Cir. 1991). Likewise, a speaker can be stopped from speaking out of order. *See Kindt*, 67 F.3d at 271; *Musso v. Hourigan*, 836 F.2d 736 (2nd Cir. 1988).

THE PROBLEM OF PROFANITY

Of the rules commonly used by school boards to preserve order in meetings, prohibitions against profane or vulgar speech are perhaps the most problematic. In a nonpublic forum, school districts may adopt and enforce anti-profanity rules against students and adults alike. *See Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Lacks v. Ferguson Reorganized School Dist. R-2*, 147 F.3d 718 (8th Cir. 1998). When a school district creates a public forum for citizens to air their views, however, the authority of its board to curtail profane or vulgar speech is more limited.

Profanity prohibitions are actually not time, place or manner regulations; rather, they are content-based exclusions. In a public forum, the validity of such prohibitions depends upon whether the wording of the rule is sufficiently narrow in scope to prohibit only utterances that receive no protection from the First Amendment.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942), the Supreme Court affirmed its longstanding position that "certain well-defined and narrowly limited classes of speech"—among them "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words"—may be prohibited and even punished by the government. School board presidents would have little difficulty maintaining civility at their meetings if they could censor any comment that, in their judgement, fell within a category listed in *Chaplinsky*. Subsequent cases, however, have narrowed the *Chaplinsky* holding to only "fighting words," *i.e.*, words whose mere utterance entails a call to violence. *See, e.g., Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

In *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), *on remand, State of New Jersey v. Rosenfeld*, 303 A.2d 889 (N.J. 1973), a teacher spoke about racial conflicts within the community at a school board meeting held in a public auditorium with a large audience that included children. As he concluded his talk, he became emotional and ended by saying that, if corrective action were not taken, "then the M— F— town, the M— F— county, the M— F— state and the M— F— country would burn down." The teacher was convicted of violating a state law that prohibited "loud and offensive or profane or indecent language" in a public meeting.

The U. S. Supreme Court vacated the conviction and remanded the case to the New Jersey Supreme Court for reconsideration in light of *Gooding v. Wilson*, 405 U.S. 518, a case in which the Court overturned an anti-profanity law as being vague and overbroad. The Court's remand triggered a vigorous dissent from four justices, who noted that the New Jersey Supreme Court had previously construed its anti-profanity law to criminalize such utterances in only two situations: (i) when the utterance is likely to incite an immediate breach of the peace or (ii) when the utterance is likely to affect the sensibilities of a hearer in light of the gender and age of members of the audience. In effect, the ruling implied that the conviction could not stand if based only upon a profane utterance to a captive listener. The dissenting justices, led by Justice Powell, a former school board president, rejected such a result:

> Perhaps appellant's language did not constitute "fighting words" within the meaning of *Chaplinsky*. While most of those attending the school board meeting were undoubtedly outraged and offended, the good taste and restraint of such an audience may have made it unlikely that physical violence would result. Moreover, the offensive words were not directed at a specific individual. But the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a call to violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience.

Rosenfeld, 408 U.S. at 905 (Powell, J., dissenting). On remand, the New Jersey Supreme Court concluded that the statute was limited to fighting words, and that the defendant-teacher had not violated the statute as construed. *Rosenfeld*, 303 A.2d at 889.

Rosenfeld notwithstanding, the Supreme Court has yet to squarely approach the question of whether a public body's interests in preserving meeting decorum or protecting an unwilling audience would permit the exclusion of profanity at a public meeting under an appropriately narrow rule or statute. Indeed, at least one circuit court has accepted the legitimacy of "decorum" rules without analysis. *Kindt*, 67 F.3d at 271; *White*, 900 F.2d at 1424-26.

The severe erosion of *Chaplinsky* by *Rosenfeld* and other rulings, however, creates legal uncertainty for school boards that wish to hold their speakers to the same civility standards that they expect of students and teachers during the school day. *Rosenfeld* suggests that school boards must distinguish between threats and other utterances that are likely to provoke violence and vulgarities and profanity that merely affect the sensibilities of the listener. Considering that offended sensibilities are often the precursor of physical violence, this distinction is not always easily made.

LIABILITY FOR FIRST AMENDMENT VIOLATIONS

When a speaker refuses to comply with the school board's rules for public comment, the presiding officer who is determined to stop the violation has essentially two options: remove the speaker or recess the meeting. Although each approach suppresses speech, physical removal of the speaker is obviously the more perilous remedy.

Speakers ejected from a public meeting may seek to vindicate their conduct by suing the presiding officer under 42 U.S.C. § 1983 for violation of their First Amendment rights. Such claims lead to two basic issues: Did the plaintiff have a constitutional right to speak? If so, is the presiding officer entitled to qualified immunity? In a § 1983 action, the presiding officer is entitled to qualified immunity unless it is shown that "a reasonable person in his position, acting on his information and motivated by his purpose, would have known that ejecting [the speaker] violated his clearly established rights." *Hansen v. Bennett*, 948 F.2d at 399. *See also Collinson*, 895 F.2d 994; *Musso*, 836 F.2d 736; *Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991). Finally, when called upon to determine liability under § 1983, some courts have expressed their reluctance to second-guess the difficult decisions that a presiding officer must make to maintain an orderly and efficient public meeting:

> An erroneous judgment call on the part of a presiding officer does not automatically give rise to liability for a constitutional tort. The mayor's actions in this case constituted a reasonable attempt to confine the speaker to the agenda item in question, and that conclusion should end the inquiry. We should not inquire whether we as presiding officers would have handled the matter in the same way.

Jones, 888 F.2d at 1334.

CONCLUSION

The presiding officer and members of a school board should understand that, if the public is invited to comment upon an agenda item or any matter within the school district's jurisdiction, a public forum is created. In a public forum, the school board can request patrons to use alternative channels to criticize school employees, but a prohibition on such comments is invalid. Rules that exclude narrow categories of speakers or subjects are also suspect and should be avoided.

Common sense rules for facilitating a public discussion, such as observing time limits, speaking only when recognized, directing comments to the presiding officer, and avoiding unduly repetitious or irrelevant comments are valid. Indeed, their enforcement is necessary to conduct an orderly and efficient meeting. The school board should formally adopt such rules and provide prior notice of them to patrons who wish to speak.[6] Finally, a presiding officer should give ample warning to any speaker whose conduct violates a rule before action is taken to halt further violations.

Case Notes

FREE SPEECH

Suspension of student who violated the school district's racial harassment and intimidation policy prohibiting the possession on school grounds of racially divisive materials by drawing and displaying a Confederate flag did not infringe on student's free speech rights.

West v. Derby Unified School District No. 260, No. 98-3247 (10th Cir. March 21, 2000)

http://www.kscourts.org/ca10/cases/2000/03/98-3247.htm

After an increase in racial incidents, the school district adopted a racial harassment and intimidation policy that prohibited "possession [of] any written material, either printed or [handwritten], that is racially divisive or creates ill will or hatred." The policy listed several examples of prohibited material including Confederate flags. During math class, a middle school student drew a Confederate flag on a sheet of paper and showed it to several of his classmates. One of the students gave the drawing to the math teacher who turned it over to the assistant principal. The student admitted that he had drawn the picture and that he knew that the racial harassment policy prohibited the drawing of a Confederate flag. Based on his investigation, the assistant principal concluded that the student violated the policy and suspended him for three days.

The student's father filed suit, alleging that the school district's racial harassment and intimidation policy violated the student's free speech rights. The district court held, relying on *Tinker* and *Bethel School District No. 403*, that the school district had a reasonable basis for forecasting that the display of racially divisive images, unconnected to any legitimate educational purpose, would lead to substantial disruption of school discipline. It also rejected the father's arguments that the policy was overbroad and vague and that it sought to impermissibly prohibit speech based on content.

In a unanimous panel decision, the Tenth Circuit affirmed the district court's holding that the school district's racial harassment and intimidation policy was without constitutional defects. The panel began its review of the student's constitutional challenges with his due process claim. Noting that the student had all but conceded that the hearing he had received from the assistant principal satisfied the requirements of *Goss*, it read his challenge as arguing that he failed to receive a "meaningful hearing" because the assistant principal made no finding that the student intended to harass or intimidate anyone. The panel found that school disciplinary hearings are not akin to criminal proceedings and, therefore, school districts are not required to prove the specific intent required to secure a conviction in a criminal case. As a result, the panel held that there was no due process violation.

The panel next turned to the student's equal protection challenge. Finding that the policy was not subject to strict scrutiny because students as a group are not a suspect class, it stated that the proper standard of review was whether the policy rationally related to a legitimate government interest. It found that the school district's stated purpose of banning the symbol in order to avoid potentially disruptive racial conflict among students that would interfere with the educational process was a legitimate government interest and that there was no equal protection clause violation.

The panel then moved to the student's claim that the policy had violated his right to free speech. Although it conceded that displaying the Confederate flag could be construed as political speech entitled to First Amendment protection outside a school setting, it pointed out that within a school setting, a student's free speech rights must be applied in light of the "special characteristics of the school environment." Based on that principle, it concluded that there was no free speech violation because there was sufficient evidence for the school district to reasonably find a very real threat of racial hostility and violence related to Confederate symbols that could only be reduced by banning the display of such symbols.

The student's final challenge argued that the policy is unconstitutionally vague and overbroad because it fails to warn students of what symbols are prohibited and brings a wide range of innocent conduct within its scope. The panel, stating that it was well settled that a court would not find a rule or policy overbroad where a school district could put a limiting construction on the policy, found such limiting construction in the school district's racial harassment and intimidation policy. Specifically, the panel found, that the policy allowed school officials to use their discretion to determine whether a student's violation of the policy was willful, *i.e.*, had the effect of creating ill will. Noting that the policy's application was limited to those situations that did not involve use of the symbol for legitimate educational purposes, such as in an American history text depicting the Civil War, the panel concluded that the policy did not threaten protected speech and was, therefore, not overbroad. The panel also rejected the student's claim that the policy was facially vague. It ruled that the evidence was clear that the student understood that his conduct was prohibited by the policy.

Teacher had no cause of action against college based on retaliation for having exercised her right to free speech when the teacher denied having engaged in the speech that resulted in her termination.

Wasson v. Sonoma County, 203 F.3d 659 (9th Cir. 2000)

A series of anonymous letters accusing the college president of misconduct circulated on the community college's campus. The college's board launched an investigation, hiring a private investigator and a document examiner to find the identity of the letter writer. Based on a comparison of handwriting and style of prose, the document examiner identified a particular teacher as the letter writer. The teacher denied that she either wrote or distributed the letters. The assistant president of the college recommended that the teacher be terminated on the grounds that

6. Policies for public meetings can be found at websites for a variety of public bodies. For example, see <http://www.tasb.org/policy/pol/private/105906/LPM/BED(L)-A.html >; <http://www.davis.k12.ut.us/policy/MANUAL/WEBDOC67.HTM#13>.

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authorship of the letters constituted "evident unfitness for service." The board adopted the recommendation and notified the teacher of its intention to terminate her. While her administrative appeal was pending, the board withdrew its notice and the teacher was reinstated. The teacher filed suit, claiming that the college retaliated against her for having exercised her right to free speech. The district court dismissed the suit on the grounds of qualified immunity.

A Ninth Circuit panel affirmed the district court's decision. However, the panel found that the teacher had failed to state a cause of action based on retaliation, because she denied having engaged in the speech in question. The panel stated that it was well settled Ninth Circuit law that a plaintiff raising a retaliation claim must establish that she engaged in constitutionally protected speech. It further observed that the Supreme Court has "never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information." In other words, it concluded that a First Amendment claim was the not proper avenue for seeking to remedy for being falsely accused of making statements uttered by someone else. Regarding the teacher's contention that she was defending the rights of the anonymous author of the letters, the panel concluded that she lacked standing.

RELIGION

School district policy permitting graduating high school students to choose a student to deliver a commencement message without any restrictions on the content of that speech did not violate the Establishment Clause of the First Amendment.

Adler v. Dural County School Board. 206 F.3d 1070 (11th Cir. 2000)

Following the Supreme Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), a school district adopted a policy permitting graduating high school students to choose one of the graduates to deliver a message at commencement ceremonies. The policy expressly stated that the school district would have no control over the choice of the student speaker or the content of the message. A group of students filed suit, alleging that the policy violated the First Amendment establishment clause and infringed on their free exercise of religion.

In a split decision, the majority of the en banc coat held that the school district's student-initiated graduation speech policy did not violate the establishment clause or infringe on the students' right to free exercise of religion. Before finding that the policy passed constitutional muster, the majority subjected the policy to analysis under the holdings in *Lee*, *Widmar*, and *Lemon*. It found that policy here, unlike the one in *Lee*, avoided the twin pitfalls of state control over selection of the speaker and the content of the speech at school graduation ceremonies, and coerced participation by a captive student audience in an exercise of religion. It noted that the policy explicitly divorced "school officials from the decision-making process as to whether any message—be it religious or not—may be delivered at graduation at all." The majority concluded that the school district's policy steered a course of neutrality thereby avoiding the constitutional prohibitions, enunciated in *Lee*, against mandating, directing, endorsing, or sponsoring religious messages at school commencement ceremonies. The majority found that the policy's neutrality argument was enhanced by analyzing the policy in line with open forum cases beginning with *Widmar*. Specifically, it found that because the school district had created a limited open forum, it had a constitutional and Equal Access Act obligation to provide access to both religious and secular messages in a neutral manner. The majority concluded that if the school district then were to scrutinize the content of the message, it would be violating both the students' free exercise and free speech along with its establishment clause obligation to remain neutral. Moving to the coercion element of *Lee*, the majority looked at "the measure of state control over the message at a graduation ceremony, rather than state control over the ceremony itself." It found no coercion because neither the schools nor the graduating students selecting the speaker had any control over the content of the message.

Analyzing the policy under *Lemon*, the majority first addressed the secular legislative purpose prong. It concluded that the policy clearly encompassed three secular purposes: (1) it affords graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker; (2) the policy allows students to solemnize graduation; and (3) the policy evinces the important secular interest in permitting student freedom of expression. It rejected the students' argument that the proffered secular purposes were a "sham." The majority further stated that the fact that the policy referenced *Lee* demonstrated the district's attempt to fulfill its constitutional obligations by instructing school officials on how to comply with the law. It likewise dismissed the students' attempt to find a sectarian purpose in the policy because it was entitled "Graduation Prayer," saying that the title was meant to do no more than to alert the reader to the subject matter of the policy rather than to affect the substance of the text. Turning its analysis to the primary effect prong, the majority concluded that the policy was content neutral because it neither mandated nor encouraged that a graduation prayer be delivered. It stated that under *Lemon* the Supreme Court has repeatedly "upheld facially neutral programs that permit individuals to support religion through their own private choices." As a result, the majority found that the policy did not have the primary effect of advancing religion. Regarding the excessive entanglement prong, it found that the policy explicitly prohibited any review of the student message, thereby ensuring minimal contact between school officials and students regarding the choice of speaker and the content of speech.

School district's exclusion of youth organization affiliated with a Christian church from use of school facilities for meetings involving prayer and religious instruction did not violate the organization's First Amendment free speech rights. The school district policy's which created a limited open forum and expressly prohibited the use of school facilities for religious purposes was reasonable and viewpoint neutral.

The Good News Club v. Milford Central School, 202 F.3d 502 (2nd Cir. 2000)

School district adopted a policy permitting the use of school facilities by outside organizations for meetings and other events "pertaining to the welfare of the community." The policy expressly prohibited the use of school facilities for religious purposes. Under the policy several organizations, including the Boy Scouts, the Girl Scouts, and the 4-H Club, were allowed to use school facilities. When a community-based Christian youth organization requested to use the facilities, it stated its purpose as instructing children in moral values from a Christian perspective. A typical meeting of the group involved prayer, Bible study, and games and songs with a religious theme. The superintendent denied the organization's request, stating that the proposed use was "the equivalent of religious worship…rather than the expression of religious views or values on a secular subject matter." The organization, protested the superintendent's denial, asserting that it violated its right to free speech, right to equal protection, and rights under the Religious Freedom Restoration Act. At the request of the school district's counsel, the organization provided materials regarding the nature of the instruction and activities that would take place at its meetings. After reviewing the materials, the superintendent and counsel determined that the activities proposed by the organization did not involve a discussion of secular subjects from a religious perspective, "but were in fact the equivalent of religious instruction itself." Based on the superintendent's report, the

school board adopted a resolution denying the organization's request to use the facilities. The organization filed suit.

Concluding that the school district's policy had created a limited public forum and that the organization's activities constituted religious instruction and prayer, the district court applied the two-prong *Rosenberger* test to determine if the school district's limitations on the forum were reasonable and viewpoint neutral. It rejected the organization's contention that it was merely teaching morals and values like the Boy Scouts, Girl Scouts, and 4-H Club, only from a religious perspective. Finding that the policy's prohibition on the use of school facilities for religious purposes was reasonable and viewpoint neutral, the court dismissed the free speech claim. Relying on *Bronx Household of Faith v. Community School District No. 10*, 127 F.3d 207 (2nd Cir. 1997), it also dismissed the equal protection claim. The organization's appeal was limited to the free speech claim.

A Second Circuit panel affirmed. Noting that the organization was contesting the district court's findings as to both the reasonableness and viewpoint neutral prongs, the panel first examined the reasonableness of the school's district's stated purpose for the restriction—that the school district did not want to create impression among students that it endorses religious instruction in its schools, or that it advances the beliefs of a particular religious group. The panel pointed to the precedent in *Bronx Household of Faith* that upheld the reasonableness of the restrictions aimed at avoiding the appearance of endorsing or advancing a particular religion. Turning to the viewpoint neutral prong, the panel agreed with the district court that the organization was doing more than merely teaching moral values from a religious perspective. In the panel's opinion, the meeting activities amounted to religious worship. It rejected the organization's attempt to equate its activities with the "moral instruction" provided by groups such as the Boy Scouts. As a result, the school district's decision to exclude the organization under its policy was based on content rather than viewpoint.

School district policy prohibiting non-student groups from using school facilities for religious services or religious instruction, but permitting discussion of religious material or material containing a religious viewpoint was not unconstitutionally vague. School district did not engage in viewpoint discrimination when it denied prayer group's request to use school facilities for its meeting because the district's use policy did not create an open forum.

Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000)

School district adopted a building use policy, which prohibits non-student groups from using school facilities for religious services or instruction, but permits discussion of religious material or material containing a religious viewpoint. The policy also bans groups from using the facilities for partisan political activities or for profit fund raising. A non-student group requested use of school facilities for a "prayer meeting" at which the group planned to "worship the Lord in prayer and music…to discuss family and political issues, pray about those issues, and seek to engage in religious and Biblical instruction with regard to those issues." The school district denied the group's request based on the policy. The group then filed suit, alleging: (1) that the school's building use policy was unconstitutionally vague both on its face and as applied to the group; and (2) that the school district had engaged in viewpoint discrimination when it denied the group access because the use policy had created an open forum. Noting that the policy failed to define "religious worship," the district court held that the policy was unconstitutionally vague because there was no intelligible way of determining when permitted speech involving religious material or viewpoint crossed over into areas of religious worship or instruction prohibited by the policy.

A Fifth Circuit panel reversed. It held: (1) that the policy was neither vague on its face nor vague as applied to the group; and (2) that there was no viewpoint discrimination because the use policy adopted by the school district had not created an open forum. Addressing the vagueness issue first, the panel began by observing that a rule or policy was unconstitutionally vague on its face only if "men of common intelligence must necessarily guess at its meaning and differ as to its application," or even if it is understandable, it is inconsistently or arbitrarily applied. Here, the terms "religious instruction" and "religious worship" had a common meaning that was unlikely to cause confusion amounting to unconstitutional vagueness. As to whether the policy was vague as applied to the prayer group, the panel concluded that the policy was not "even arguably vague." It found that the group's request contained "verbatim some of the prohibited terms," such as its plan to worship God in prayer and music, and conduct religious and Bible instruction. In the panel's words, "There can be no doubt that these activities are included within the policy's disallowed uses." It also rejected the argument that the school district had arbitrarily applied the policy to the group because the requests for use made by other religious groups had been for clearly secular events distinguishable from a prayer meeting.

Regarding the issue of whether the school district had engaged in viewpoint discrimination when it denied the prayer group access to school facilities, the panel rejected the group's argument that adoption of the policy had created a open forum. It found that the policy did not open the facilities to indiscriminate use, but rather narrowly restricted its use by prohibiting groups from not only religious instruction and worship but also from partisan political meetings and for profit fund raising events. As a result, the panel held that the restrictions in the policy were sufficient for the school facilities to maintain their non-public forum status. The group also contended that the policy was unconstitutional even under the standard applied to non-public forums because the school's district's exclusion of the group was based on viewpoint rather content consideration. Specifically, the district allowed other religious organizations to hold events in school facilities while denying the prayer group use because of its religious viewpoint. The panel concluded that the group's exclusion was not based on its religious views, but simply because religious instruction or worship of any kind was prohibited.

SPECIAL EDUCATION

Parent who unilaterally placed special education student in a private institution was not entitled to reimbursement under IDEA because the parent's lack of cooperation deprived the school district of a reasonable opportunity to conduct an evaluation of the student and fulfill its obligation under IDEA.

Patricia P. v. Board of Education of Oak Park, 203 F.3d 462 (7th Cir. 2000)

Prior to special education student's entering high school, the school district conducted an evaluation and met with the student's parent to develop an IEP. Disagreeing with the school district's proposed placement, the parent enrolled the student in a local Catholic school that did not provide any specialized programs for students with behavioral disorders. At the end of his first year at the Catholic school, school officials refused to allow the student to return due to behavior problems. The parent then enrolled the student in the public high school. However, during the summer the parent unilaterally placed the student in a private out of state residential program where he remained for the duration of his high school education. The parent sought reimbursement through due process hearings. After exhausting her administrative remedies, the parent filed suit in district court. After reviewing the records of the administrative hearings, the court granted the school district's motion for summary judgment.

The Seventh Circuit in a panel decision affirmed the district court. Focusing on the merits of the parent's claim, it first observed that any claim for reimbursement under IDEA must be premised on the cooperation of the parties in the placement process. The panel noted that several circuits agree that the parent's right to seek reimbursement for unilateral placement of her child is available only if a court finds that, after cooperating with the school district, there are "sufficiently serious procedural failures by the school district." It also acknowledged that IDEA's preference for cooperative placement process serves the practical purpose of encouraging an evaluation before placement. As a result, the panel concluded that when a parent fails to cooperate by depriving the school district of a reasonable opportunity to evaluate the special education student, the parent is barred from raising a claim for reimbursement for unilateral private placement, even if the placement is ultimately appropriate.

Parents of a disabled student may be reimbursed for an independent evaluation when the school district's evaluation is inappropriate. Here, school district's evaluation of student was not inappropriate, even though it did not comply with the state department of education's guidelines. Parents were entitled to attorneys' fees and costs as a prevailing party. Even though they did not obtain a judgment in a lawsuit or a formal settlement, the parents secured the requisite "legal change" for an award of attorneys' fees and costs.

Holmes v. Millcreek Township School District, 205 F.3d 583(3rd Cir. 2000)

Parents of a severely deaf student disagreed with the school district about the method for reevaluating the student. When the school district denied their evaluation request, the parents arranged and paid for an independent evaluation. The parents requested a due process hearing to obtain reimbursement for the cost of the independent evaluation. Around the same time the parent also requested a due process hearing regarding the qualifications of their child's interpreter. After the hearing process had begun, the parents requested an independent evaluation of the interpreter's skills. After the evaluator's report was completed, but before it was presented at the hearing, the interpreter transferred to another position. The hearing officer found that the issue of his qualifications was not moot on the grounds that it went to the parents' claim for compensatory education. The hearing officer also ruled that the parents were entitled to reimbursement for the cost of the independent evaluation because the evaluation provided information that helped to determine the nature and extent of the student's disability. An appeals review panel reversed. The parents subsequently filed an action in district court, seeking attorneys' fees and costs as a prevailing party in the due process hearing. The court held that the parents were a prevailing party and awarded them attorneys' fees and costs. In addition, it reversed the review panel's denial of reimbursement for the independent evaluation. However, the district court did not determine if the school district could have or did conduct an appropriate evaluation.

A Third Circuit panel held that the parents were not entitled to reimbursement for the cost of the independent evaluation because the school district's reevaluation of the student was appropriate. However, it held that the parents were a prevailing party within the meaning of IDEA because the parents' success in effecting the removal of the student's interpreter constituted the requisite "legal change" for an award of attorneys' fees and costs. Regarding the reimbursement issue, the panel found that the district court had incorrectly focused on the school district's reliance on the parents' independent evaluation while developing the student's IEP rather than considering whether the school district's reevaluation was appropriate. The panel rejected parents' contention that the school district's reevaluation was inappropriate because it failed to comply with the state department of education's guidelines for educating children with the student's particular disability. It pointed out that the guidelines were not established law and the lacked the mandatory statutory or regulatory language necessary to be binding on the school district.

Turning to the parents' claim for attorneys' fees and costs, the panel observed that the parents' objective of removing the student's interpreter was accomplished as a result of their initiating the due process hearing. However, the panel reduced the amount of the award to reflect that the parents had not succeeded on their claim for reimbursement for the independent evaluation and that their counsel had contributed to "the needlessly protracted proceedings."

Special education student, who had graduated and was seeking monetary damages for wholly past injuries, was not required to exhaust his administrative remedies under IDEA because there no longer was any adequate administrative remedy available, making exhaustion futile.

Covington v. Knox County School System, 205 F.3d 912 (6th Cir. 2000)

Special education student with multiple mental and emotional disabilities was periodically locked in a "time out" room during a four-year period. The room, which was 6 by 4 feet with a concrete floor, had no light, no heat, no ventilation, and only a small reinforced window. The student was often locked in the room for several hours at a time without supervision. The parent requested a due process hearing pursuant to IDEA. Over a three year period the hearing was delayed on numerous occasions and never took place. During this period, the parent filed suit under § 1983 seeking monetary damages for alleged violations of the student's Fourth, Fifth, and Fourteenth Amendment rights. Relying on *Hayes v. Unified School District No. 377*, 877 F.2d 809 (10th Cir. 1989), the district court held that the parent was required to exhaust the administrative remedies available under IDEA because the focus of the suit, *i.e.*, school disciplinary practices, was part of the student's IEP and, thus, a matter subject to IDEA. Finding that the parent had failed to demonstrate that exhaustion of administrative remedies was futile, the court granted the school district's motion for summary judgment.

The Sixth Circuit in a unanimous panel decision reversed and remanded. Because the panel concluded that exhaustion would have been futile in the parent's case, it did not reach the issues of whether the complaint fell within the ambit of IDEA or whether a claim independent of IDEA must still utilize the state's administrative process before filing suit in federal court. For the same reason, the panel also did not reach the Seventh Amendment or equal protection claims. Instead, it focused its analysis on the futility exception to the exhaustion requirement. While agreeing that seeking monetary damages alone was insufficient to relieve a plaintiff of the exhaustion requirement, the panel concluded that under the circumstances of the case, the parent had demonstrated that her claim was based on retrospective injuries that were incapable of repetition and, therefore, there was no equitable relief available to make the student whole. Citing *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995), *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999), and *Plasencia v. California*, 29 F. Supp.2d 1145 (C.D. Cal. 1998), the panel held that "while a claim for money damages does not automatically create an exception to the exhaustion requirement of the IDEA, in this case exhaustion would be futile because money damages, which are unavailable through the administrative process, are the remedy capable of redressing [the student's] injuries."

School district was not required under IDEA to consider private preschool placement of student while developing his IEP, because the private preschool lacked either state accreditation or approval. Parents were not entitled to reimbursement of tuition costs for unilateral placement of student in a private preschool because the school district's placement also provided the student with a free appropriate public education.

T.R. v. Kingwood Township Board of Education, 205 F.3d 572 (3rd Cir. 2000)

The parents of a disabled student rejected the district's recommendation that the student be placed in a regular kindergarten program, stating their intention to keep him in preschool for another year. The school district offered a preschool program in which half the students were disabled and the other half were nondisabled. The parents rejected the second proposed IEP and enrolled the student in a private preschool. They then requested that the school district pay for the student's tuition to preschool and provide supplemental educational services there. The school district requested a due process hearing to determine whether its IEP provided the student with a free appropriate public education in the least restrictive environment. An administrative law judge ruled the district's program satisfied IDEA requirements, and thus, the district was not liable for the student's private preschool tuition. The parents filed suit, alleging that the administrative law judge had erred in finding that the school district had provided the student with a free appropriate public education in the least restrictive environment. The district court granted summary judgment for the school district.

The Third Circuit affirmed the district court's holding that the school district's IEP provided the student with a free appropriate public education, but vacated and remanded the court's holding that the district's placement constituted the least restrictive environment. Addressing the issue of whether the school district's IEP had provided the student with a free appropriate public education, the majority found that the school district had introduced sufficient evidence to satisfy the standard of providing "significant learning" and conferring a "meaningful benefit." Turning to the issue of whether the school district's IEP had satisfied IDEA's least restrictive environment requirement, the majority opined that the school district's hybrid preschool program would satisfy the least restrictive environment requirement under only two circumstances: (1) if education in a regular classroom could not be achieved; or (2) if a regular classroom was not available within a reasonable commuting distance of the child. After reviewing the record, it found that there was nothing to indicate the student could have been educated satisfactorily in a regular classroom. However, it found that the district court had failed to inquire as to whether regular classroom options were available within a reasonable distance to implement the student's IEP. Therefore, the majority remanded the case to consider this question.

Regarding the parents' contention that school district had violated IDEA when it failed to consider the private preschool program, even though the program would provide a free appropriate public education in the least restrictive environment, the majority concluded that the district was not required to consider the private preschool program because it was not accredited under state law. Addressing the parents' claim for reimbursement of the cost of their unilateral private placement of the student, the majority held that the parents were not entitled to reimbursement of the cost of their unilateral placement of the student in an unaccredited private preschool program, even though that program provided the student with an appropriate education in the least restrictive environment, because the school district's proposed placement also provided the student with a free appropriate public education.

EMPLOYMENT RIGHTS

Teacher's transfer to school where he had to rotate classrooms instead of having one of his own was not a "materially adverse change" that would constitute an adverse employment action within the meaning of the ADEA. Assignment of teacher who previously taught special education students to teaching keyboarding skills to mainstream classes also was not adverse employment action within the meaning of the ADEA.

Galabya v. New York City Board of Education, 202 F.3d 636 (2nd Cir. 2000)

Sixty-eight year old teacher who had been teaching keyboarding skills at a special education junior high school was transferred when the school created a computer lab and decided to staff it with a fifty-three old teacher with more seniority. The teacher was transferred to a mainstream high school to teach keyboarding skills. There was no reduction in pay, but unlike the junior high where the teacher had his own classroom, in the new school he rotated classrooms with the rest of the faculty. After a series of disputes at the high school, the teacher took a leave of absence and was eventually terminated. The teacher filed suit, alleging violation of his rights under the Age Discrimination in Employment Act (ADEA). The district court granted the school board's motion for summary judgment. It held that under the *McDonnell Douglas* analysis, there was no adverse employment action as a matter of law, but rather a lateral transfer.

A Second Circuit panel affirmed, holding that neither being deprived of his own classroom nor the change from teaching special education students to mainstream students constituted adverse employment actions within the meaning of the ADEA. Regarding the teacher's claim that the disparity in working conditions between the junior high and the high school constituted an adverse employment action, the panel's analysis focused on whether the change was a "materially adverse change." It observed that such a change must be something more than a mere inconvenience, such as a loss of salary or benefits, or significantly diminished material responsibilities. In the teacher's case, the panel found no evidence that the transfer involved any "materially adverse change." On the contrary, it concluded that "As a matter of law, the disparity in working conditions—which reduces to the fact that teachers at [the high school] rotate through classrooms whereas teachers at [the junior high] have their own classrooms may be characterized as minor." Turning to the issue of whether the teacher's transfer from special education classes to mainstream classes was a "materially adverse change" constituting an adverse employment action, the panel concluded that the teacher had failed to present evidence sufficient to raise a genuine issue of material fact. It found nothing in the record to show that the teacher's assignment at the high school was materially less prestigious, materially less suited to his skills and expertise, or materially less conducive to career advancement.

EQUAL ACCESS ACT

School district violated the Equal Access Act when it denied high school students permission to form a gay-straight alliance club and meet in school facilities. District's policy on the formation of noncurriculum related student clubs had created a limited open forum, and its denial to the gay-straight alliance constituted viewpoint discrimination.

Colin v. Orange Unified School District, 83 F.Supp. 2d 1135 (C.D. Cal. 2000)

Pursuant to school district policy, a group of students submitted an application to form a gay-straight alliance club. Although the principal

usually reviewed and approved applications to form clubs, the gay-alliance application was passed on to the superintendent who in turn presented it to the school board. After several months, the board voted to deny the club approval on the grounds: (1) that the club would be discussing subject matter that is part of the school's sex education curriculum; and (2) it considered the unrestricted and unsupervised student-led discussion of sexually related topics age inappropriate and likely to interfere with the legitimate educational concerns regarding sex education. The board stated that it would reconsider the club's application if it changed its name and revised its mission statement to indicate that sex, sexuality and sex education would not be discussed in club meetings. The students filed suit, alleging violation of their rights under the Equal Access Act and the First Amendment.

The district court granted the students' motion for a preliminary injunction, holding that the school district had engaged in impermissible content discrimination when it denied the students' application to form the gay-straight alliance club. Under the Equal Access Act when a school "allows some 'noncurricular' student groups, it can not deny others 'on the basis of the religious, political, philosophical, or other content of the speech' at the student meetings." The district court first determined that the school district's policy and practice of opening school facilities to noncurricular student clubs without regard to their viewpoint or content created a limited public forum. It stated that once that forum was in place, the school was precluded from discriminating against student groups seeking access to the forum. The court rejected the school district's argument that the gay-straight alliance was not protected by the Equal Access Act because the club's content was related to the school district's sex education curriculum. Based on the evidence presented by the students, the court concluded, that even though there might be some overlap between the subject matter of the club's meetings and the sex education curriculum, the club was still considered noncurriculum-related under the Act. It further stated that whether the club was noncurriculum-related was relevant only for purposes of triggering the school's obligations under the Equal Access Act. It stated, "contrary to the Board's interpretation of the Act, the Board may not foreclose access to the 'limited open forum' merely by labeling a group curriculum-related." The district court also rejected the school district's contention that the gay-straight alliance was controlled by an outside adult gay advocacy group in violation of the Equal Access Act's requirement that "nonschool persons may not direct conduct, control, or regularly attend activities of student groups." It found that the only role that the adult gay group had played was to provide moral and emotional support and information regarding the students' legal rights during the students' struggle to form their club.

VOUCHERS

Florida's Opportunity Scholarship Program (OSP), providing parents of students at low performing elementary and secondary public schools with voucher funds to send their children to private schools, violates Article IX, section 1 of the Florida Constitution requiring the state to provide a free education through a system of public schools.

Holmes v. Bush, No. 97-3370 (Fla. Cir. Ct. March 14, 2000)

http://www.clerk.leon.fl.us/3370.pdf

The State of Florida enacted the Opportunity Scholarship Program (OSP) which allowed parents of children attending public elementary and secondary public schools rated as low performing schools to apply for and receive scholarship funds from the state to attend private schools. The tuition funds were to be paid by way of a restrictive endorsement.

A group of taxpayer-parents, joined by the state teachers' association, filed suit in state circuit court. They challenged the OSP law on several state constitutional grounds and the establishment clause of the First Amendment of the U.S. Constitution.

The circuit court narrowed the challenge to the single issue of whether the OSP law violates Article IX, section 1 of the Florida Constitution, which requires the state to provide a free education through a system of public schools.

The plaintiffs argued that the provision established the exclusive manner by which the state was to fulfill its constitutional duty to provide for the education of the state's children. The state, on the other hand, contended: 1) that the plaintiffs' interpretation of Article IX, section 1 was incorrect because the state constitution does not clearly prohibit the state legislature from providing education through private schools, but rather provides a floor for legislative action; 2) that the state supreme court had already approved statutes authorizing state payment of private school tuition for special needs students; 3) that the plaintiffs' reading of Article IX, section 1 would result in several state programs, such as the preschool program, the dropout prevention program and special education programs, being held unconstitutional; and 4) that the OSP law does not violate Article IX, section 1, because it falls within the context of the provision's clause that authorizes "other public education programs that the needs of the people may require."

Agreeing with the plaintiffs' interpretation of Article IX, section 1, the court found that the state constitution clearly directs how the state is to carry out its educational mandate and the manner in which it is to fulfill that duty, in particular by providing "a uniform, efficient, safe, secure, and high quality *system of free public schools*." Relying on *Weinberger v. Board of Public Instruction*, 112 So. 253 (Fla. 1927), the circuit court stated that it was well settled that the type of compulsory language found in Article IX, section 1 had repeatedly been found by the state supreme court to "constitute an exclusive direction as to how a 'thing shall be done.'" It, therefore, concluded that because Article IX, section 1 directs that public education for grades K-12 be accomplished through a system of free public schools, it, in effect, prohibits the state legislature from providing elementary and secondary public school education in any other way.

The court rejected the state's argument that the language in Article IX, section 1 is not exclusive, but merely provides for the minimum level of education that the state is required to provide, or in other words, it provides a floor which the state is free to exceed by providing tuition funds for private schools.

Turning to the state's second argument, the court found the state's reliance on *Scavella v. School Board of Dade County*, 363 So.2d 1095 (Fla. 1978), for the proposition that the state supreme court had already approved statutes authorizing state payments for private school education under the Article IX, section 1 clause "other public education programs that the needs of the people may require," was misplaced. It concluded that *Scavella* was not relevant to the issue in the present case because it only dealt with the issue of private school placement of special education students, while the OSP does not relate to special education students. It pointed out that OSP recipients at low ranked public schools could have their educational needs met elsewhere in the public school system.

It also found the state's contention that plaintiffs' reading of Article IX, section 1 would result in constitutional invalidation of several school related programs without merit because the programs cited by the state were clearly designed to provide services not readily available in the public school system to meet the specialized needs of students. In essence, the court concluded that special needs programs, such

preschool programs or drop out prevention programs, are supplemental to the state's mandate to provide a free education through a system of public schools, while the OSP is an attempt to supplant the system of free public schools mandated by the state constitution.

Finally, the circuit court found that the language in Article IX, section 1 referring to "'other public education programs' was not intended to allow the State to set up an alternative to the system of free public schools." As a result, it concluded that the OSP is not one of those "other public education programs" contemplated by Article IX, section 1 to supplement the state's public school system, but a program designed to provide an alternative to the constitutionally mandated free public school system.

What's New . . .in the Supreme Court

DECISIONS

98-405 & -406: ***Reno v. Bossier Parish School Board,*** 120 S. Ct. 866 (2000). After the Bossier Parish Police Jury redrew its electoral districts based on the most recent census demographics, the school board followed suit using the same redistricting plan. Although the U.S. Attorney General had granted the Police Jury's plan preclearance pursuant to the Voting Rights Act of 1965, when the NAACP challenged the school board's plan, the Attorney General denied preclearance. The school board then filed an action in district court, seeking judicial preclearance of the plan under section 5 of the Voting Rights Act of 1965. The Attorney General argued: (1) that the plan violated section 2 because it did not create as many majority-black districts as it should have; section 2 of the Act prohibits discriminatory voting practices; and (2) that the plan violated section 5 of the Act, even though it had no retrogressive effect, because it was enacted for a discriminatory purpose. Rejecting both claims, the district court granted preclearance. As to the first claim, it ruled that it could not deny preclearance under section 5 based on a violation of section 2 because it would be allowing the Attorney General to do indirectly what it could not do directly, *i.e.*, use section 2 evidence to prove discriminatory purpose under section 5. Regarding the second claim, the court concluded that the school board had satisfied its burden that the plan was adopted for two legitimate nondiscriminatory purposes: (1) to assure prompt preclearance, based on acceptance of the Police Jury's identical plan; and (2) to enable easy implementation. After the Supreme Court granted *certiorari*, it vacated and remanded the case for further findings regarding the school board's purpose in adopting the plan. On remand, the district court again granted preclearance concluding that there was no evidence to support a finding that went beyond the presence or absence of retrogressive intent. The Supreme Court again granted *certiorari* to decide whether the section 5 purpose inquiry extends beyond the search for retrogressive intent.

The Court affirmed the district court's grant of preclearance to the school board's plan. Delivering the Court's opinion, Justice Scalia rejected the Attorney General's and NAACP's argument that the purpose and effect prongs of section 5 have different meanings. Relying on *Beer v. United States*, 425 U.S. 130 (1976), he concluded that because the effect and purpose prongs are contained within the same sentence, in the context of a vote-dilution claim, they are both limited to the issue of whether there is a retrogressive intent. Justice Scalia found no support in section 5 case law for the proposition that the purpose prong has a more general discriminatory meaning. While he acknowledged that *Richmond v. United States*, 422 U.S. 358 (1975), might appear to give section 5 that broader meaning, the justice concluded that any discontinuity between the purpose and effect prongs was necessitated by the fact that the case was an annexation case requiring an exception to the retrogressive-effect principles in order to prevent all routine annexations from being ruled constitutionality invalid. He read the appellants' contentions as nothing more than a plea to overrule *Beer* without making that explicit argument. Justice Scalia stated that in light of *Beer*, the appellants' suggestion that section 5 extends to discriminatory but non-retrogressive vote-dilutive purposes lacks any support in the language of section 5.

98-791: ***Kimel v. Florida Board of Regents,*** 120 S. Ct. 631 (2000). Petitioners were a group of current and former university employees that filed suit against the university when it failed to provide them a previously agreed upon market salary adjustment. They alleged that the university's action violated the ADEA and the comparable state statute. The district court denied the university's motion to dismiss, holding that Congress had expressed its intent to abrogate the states' immunity when it enacted the ADEA and that the ADEA was a proper exercise of its section 5 power under the Fourteenth Amendment. Several other cases involving the constitutional validity of abrogation by the ADEA were consolidated on appeal. In a divided panel opinion the Eleventh Circuit held that the language in the ADEA failed to evidence Congress's clear and unmistakable intent to abrogate the states' Eleventh Amendment immunity. Although the panel did not decide the issue of whether Congress had section 5 power to abrogate under the ADEA, it stated its belief that "good reason exists to doubt that the ADEA was (or could have been properly) enacted pursuant to the Fourteenth Amendment." The Supreme Court granted *certiorari* on both the issue of whether Congress manifested a clear unmistakable intent to abrogate the states' immunity when it enacted the ADEA and whether Congress had section 5 power to do so.

The Court's opinion was delivered by Justice O'Connor who held that although the ADEA contained a clear statement of Congress's intent to abrogate the states' immunity, the abrogation exceeded Congress's authority under section 5 of the Fourteenth Amendment. Justice O'Connnor's opinion began with a restatement of the Seminole Tribe test: 1) whether Congress unequivocally expressed its intent to abrogate the states' immunity; and (2) if it did, whether Congress acted pursuant to a valid grant of constitutional authority.

Addressing the first prong of the test, she found that § 216(b) of the ADEA satisfied the intent requirement when it provided for suits by individuals against states by authorizing employees to maintain actions for back pay against any employer, including a public agency, in any federal or state court of competent jurisdiction. She rejected the respondents' arguments as attempts to create ambiguity in the language where there is none. Specifically, Justice O'Connor found nothing in the phrase "court of competent jurisdiction" that rendered Congress's intent ambiguous. In addition, she found nothing in the fact that the ADEA had its own enforcement provision that clouded Congress's intent as expressed in § 216(b).

Justice O'Connor then turned to the second prong of the test. She first noted that the Court had previously held that the ADEA was valid under Congress's commerce clause power. Pointing out that *Seminole Tribe* established the principle that Congress lacks the power under the commerce clause to abrogate the states' immunity, Justice O'Connor stated that Congress's abrogation power rests solely within section 5. Citing the *City of Boerne*, she noted that Congress's legislative power under the Fourteenth Amendment was limited to enforcing those rights guaranteed by the Fourteenth Amendment rather than creating new rights. As a result, Justice O'Connor applied the "congruence and proportionality" test set out in *City of Boerne* to determine if the ADEA is

"appropriate legislation" under section 5 of the Fourteenth Amendment. Noting that it was well established that age was not a suspect classification, she wrote that states are permitted to discriminate on the basis of age without violating the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest. Justice O'Connor concluded, given the lower constitutional standard that the state was required to meet in regard to age classifications, that the broad reach of the ADEA's protections resulted in prohibiting state actions that failed to rise to the level of constitutional violations. She further found that the ADEA's legislative record failed to establish that Congress had any credible evidence that state and local governments were unconstitutionally discriminating against their employees on the basis of age. As a result, Justice O'Connor held that the ADEA was not a valid exercise of Congress's power under section 5 of the Fourteenth Amendment.

98-1111: ***Texas v. Lesage***, 120 S. Ct. 467 (1999). In a per curiam decision the Supreme Court extended its ruling in *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274 (1977), beyond governmental decisions involving alleged retaliation for protected First Amendment activity. This case involved a claim by a Caucasian applicant who failed to gain admission to a public university graduate program that the school had violated his rights under the Equal Protection Clause because it considered race in its admissions review process. The university sought summary judgment based on evidence that the applicant would have been rejected even absent the consideration of race since the review committee considered many other applicants to have better credentials. Although the university prevailed in the district court, the Fifth Circuit reversed, holding that an applicant who was rejected at a stage of the review process that was race conscious had suffered an implied injury. Since there was a factual dispute as to whether the stage at which this applicant was rejected was in some way race conscious, summary judgment was inappropriate.

The Supreme Court reversed, holding that "where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983." In cases involving charges of racial discrimination where there is no allegation of an ongoing or imminent constitutional violation to support a claim for prospective relief, the government can avoid liability by proving that it would have made the same decision without the impermissible motive. In this case, the university had met that burden.

The Supreme Court did not address whether the applicant had abandoned his claim for injunctive relief on the ground that the university is continuing to operate a discriminatory admissions process. The Court also left the applicant's claims under section 1981 and Title VI of the 1964 Civil Rights Act for disposition on remand.

98-1189: ***Board of Regents of the University of Wisconsin System v. Southworth***, 120 S.Ct 1346 (2000). The Board of Regents of the University of Wisconsin System requires all students at its Madison campus to pay a student activity fee to support various campus services and extracurricular activities. The fee is segregated into allocable and nonallocable portions. The allocable portion is disbursed to registered student organizations (RSO) in three ways: (1) by an RSO requesting funds from the student government activity fund (SGAF); (2) by an RSO requesting funds from the general student services fund; or (3) by student referendum, which encompasses both funding and defunding of an RSO. The RSOs represent a range of political and ideological expression. A group of students filed suit, alleging that the mandatory fee violated their First Amendment right to free speech because use of their money to support viewpoints with which they disagree constitutes compelled speech. The district court granted the students' motion for summary judgment, holding that the mandatory fee compelled students "to support political and ideology activity with which they disagree" in violation of their rights to freedom of speech and association. Relying on the Supreme Court's compelled speech precedents, a Seventh Circuit panel affirmed in part, reversed in part, and vacated in part. Following the Seventh Circuit denial of the university's motion for an en banc rehearing, the Supreme Court granted the petition for *certiorari*.

In a unanimous decision, the Supreme Court held that university's mandatory student activity fee does not violate students First Amendment, except to the extent that funds may be allocated by a majority student vote (referendum) rather than in a viewpoint neutral manner. Justice Kennedy delivered the Court's opinion. Justice Kennedy's opinion began from the premise that like the nonunion teachers in *Abood* who were required to pay fees to the union and the lawyers in *Keller* who were required to join the state bar association, the students were entitled to some First Amendment protection. However, he found the constitutional standard applied in those cases unworkable in the context of extracurricular student speech at a university. Finding a better analogy in the public forum cases, he concluded that the viewpoint neutrality standard was controlling as applied to the funding of extracurricular student speech with mandatory student fees. Agreeing that it would be inevitable that the fees would subsidize speech that some would find objectionable and offensive, he suggested that a university could protect students' First Amendment interests by providing an optional or refund system. However, he emphasized that the Court was not mandating such a solution because it could prove to be disruptive and expensive to the university's program supporting extracurricular speech. Justice Kennedy, relying on *Rosenberger*, concluded that the university "may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle." Observing that the record was not fully developed regarding the referendum aspect of the fee program, he cautioned that "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires."

Justice Souter's concurrence took issue with the majority's imposition of what he characterized as "a cast-iron viewpoint neutrality requirement." He believed that the students' First Amendment interests were insufficient to merit any protection beyond the viewpoint neutrality protection that the university had already accorded to the students. In his opinion, the issue was not whether the standard to be imposed was viewpoint neutrality, but rather whether the students had a claim to relief from the viewpoint neutral scheme. Rejecting the idea that either academic freedom or compelled speech cases were dispositive, Justice Souter cited his dissenting opinion in *Rosenberger* for the proposition that the fee was in the nature of a tax and, as such, case law suggests "that under the First Amendment the government may properly use its tax revenue to promote general discourse."

SUMMARY DISPOSITION

A-320: ***Zelman v. Simmons-Harris***, No. 99-1740 (N.D. Ohio Aug. 24, 1999). On Nov. 5, 1999 the Supreme Court granted by a 5-4 margin a request of the State of Ohio that new students be allowed to participate in Cleveland's voucher program while litigation surrounding its constitutionality continues. Ohio requested emergency action by the Supreme Court when the Sixth Circuit failed to respond to its request for review of a district court order prohibiting participation of new students.

98-829 and 99-423: ***Florida Department of Corrections v. Dickson***, 139 F.3d 1426 (11th Cir. 1998) and ***Alsbrook v. Arkansas***, 184 F.3d 999 (8th Cir. 1999). The Supreme Court had consolidated these cases for review to determine whether the Americans with Disabilities Act (ADA) properly abrogates the sovereign immunity of states from

suit in federal court. *Review granted.* Jan. 21, 2000 and Jan. 25, 2000. Dismissed under Rule 46, Feb. 23, 2000 and Mar. 1, 2000.

99-1274: ***Arlington County School Board v. Tuttle***, 195 F.3d 698 (4th Cir. 1999). Local Virginia school board had asked the Supreme Court to hear its challenge to Fourth Circuit determination that board's policy that uses race as one of several factors to weight lottery used to select students for admission to county wide traditional school violates the equal protection clause. The board had adopted the policy to ensure a diverse student body based on its determination that diversity provides certain educational benefits. The Fourth Circuit had invalidated the policy without development of a factual record. Dismissed under Rule 46, March 28, 2000.

ARGUED

98-1648: ***Mitchell v. Helms***, 151 F.3d 347 (5th Cir. 1999). Supreme Court heard oral arguments in review of a Fifth Circuit decision that ruled that a Louisiana school district's program under Chapter 2 of Title I of the 1965 Elementary and Secondary Education Act (now Title VI of the Improving America's Schools Act) through which it used federal funds to purchase computers, software and library books for sectarian schools violates the establishment clause of the First Amendment. *Cert. granted,* June 14, 1999. Argued, Dec. 1, 1999.

98-1828: ***Vermont Agency of Natural Resources v. United States***, 162 F.3d 195 (2d Cir. 1999). High Court will review decision of the Second Circuit that held that states are "persons" that can be sued under the *qui tam* provisions of the False Claims Act. Eleventh Amendment immunity does not apply in such actions brought by individuals because the real party in interest is the United States. *Cert. granted,* June 24, 1999. Argued, Nov. 29, 1999.

99-29: ***Brzonkala v. Morrison***, 169 F.3d 820 (4th Cir. 1999)(en banc). Supreme Court will review decision of the Fourth Circuit that held that Congress exceeded its authority under the commerce clause and the section 5 of the Fourteenth Amendment by creating private right of action for those who are subjected to violence motivated by gender under the Violence Against Women Act of 1994. *Cert. granted,* Sept. 28, 1999. Argued, Jan. 11, 2000.

99-62: ***Santa Fe Independent School Dist. v. Doe***, 168 F.3d 806 (5th Cir. 1999). School district has asked Supreme Court to review Fifth Circuit determination that public school policy that permits high school students to choose whether to offer invocations and benedictions at football games without any restriction against sectarian and proselytizing prayers violates the establishment clause. *Cert. granted,* Nov. 15, 1999. Argued, Mar. 29, 2000.

99-536: ***Reeves v. Sanderson Plumbing Products, Inc.***, unpub. op. (5th Cir. April 22, 1999). Supreme Court will determine whether in an action brought under the Age Discrimination in Employment Act, a plaintiff must show direct evidence of discriminatory intent in order to avoid judgment as a matter of law for the employer. *Cert. granted,* Nov. 8, 1999. Argued, Mar. 21, 2000.

REVIEW GRANTED

99-901: ***Brentwood Academy v. Tennessee Secondary School Association***, 180 F.3d 758 (6th Cir. 1999). Supreme Court will review Sixth Circuit decision that voluntary secondary school athletic association is not a state actor. Appeals court reasoned that although the association is incorporated under state law, it receives no state funding but rather obtains most of its income from ticket receipts at various interscholastic athletic events. Since it is not a state actor, its sanctions against a private school for an alleged rule violation cannot be deemed to violate the First Amendment. *Cert. granted,* Feb. 22, 2000.

REVIEW DENIED

99-596: ***George Mason University v. Litman***, 4th Cir. 1999. Supreme Court turned down Virginia state attorney general's request for review of Fourth Circuit decision that Congress validly conditioned the receipt of federal funds on the state's waiver of sovereign immunity from suits in federal court for alleged violations of Title IX of the Education Amendments of 1972. Review denied, Feb. 22, 2000.

99-812: ***Bridenbaugh v. O'Bannon***, 185 F.3d 796 (7th Cir. 1999). Supreme Court has denied request to determine whether the Seventh Circuit correctly held that an Indiana statute making Good Friday a state holiday is permissible under the First Amendment. Seventh Circuit found that the law had a valid secular purpose in affording a long spring weekend to its employees, many with spouses and children who would be off from school or work. Review denied, Mar. 6, 2000.

99-914: ***Kellenberg Memorial High School v. Section VIII of New York State Public High School Athletic Association, Inc.***, 255 A.D.2d 320, 679 N.Y.S.2d 660 (N.Y. App. Div. 1999). Supreme Court will not hear nonpublic high school's challenge to decision by New York state court that dismissed school's claim that athletic association violated its due process and equal protection rights by denying its application for admission. Review denied, Feb. 22, 2000.

99-1031: ***Gomez v. Dade County School Board***, 181 F.3d 108 (11th Cir. 1999). Supreme Court has denied a request to consider Eleventh Circuit decision holding that evidence presented by plaintiff in retaliation claim brought under Title VII of the Civil Rights Act of 1964 failed to reach "threshold level of substantiality" required to state such a claim. Eleventh Circuit had also approved jury instruction that plaintiff had burden to persuade jury that legitimate, non-retaliatory reasons offered by the employer for its action were not true. Review denied, Feb. 22, 2000.

99-1051: ***Benedict v. Eau Claire Public Schools***, unpub. op. (7th Cir. Aug. 23, 1999). Supreme Court declined to grant teacher's petition for review of Seventh Circuit ruling that her claim of discrimination under the Age Discrimination in Employment Act and Americans with Disabilities Act was barred by claim preclusion principles. Review denied, Feb. 22, 2000.

99-1069: ***Montgomery County, Md. Public Schools v. Eisenberg***, 197 F.3d 123 (4th Cir. 1999). Supreme Court let stand a decision by the Fourth Circuit that district's policy of using race as one factor in determining whether to deny school transfers violates the equal protection clause. The policy was adopted to maintain diverse student enrollments for educational reasons and to avoid racial isolation. Review denied, Mar. 20, 2000.

99-1099: ***Lukan v. Scott***, 183 F.3d 342 (5th Cir. 1999). High Court will not review decision by the Fifth Circuit that superintendent did not violate employee's constitutional rights and was entitled to qualified immunity. The employee, an internal auditor for the district, had shown that the superintendent had removed certain responsibilities from the employee's control and had recommended that his contract not be renewed after the employee had reported financial improprieties to the state education agency and the district attorney. However, the employee failed to show that superintendent had blocked his hiring for position as chief financial officer or internal auditor based on the employee's whistle blowing activities. The hiring committee members had testified that they based their decision on candidate rankings. Review denied, Mar. 20, 2000.

99-1205: ***Owsley v. San Antonio Independent School Dist.***, 187 F.3d 521 (5th Cir. 1999). Supreme Court has declined review of

decision by Fifth Circuit that athletic trainers who work 60 hours a week are not entitled to overtime compensation under the Fair Labor Standards Act. The Fifth Circuit so ruled based on its determination that trainers are required to have a college degree, such that their additional short term study of anatomy, physiology and sports medicine does not preclude their inclusion under the "learned" prong of professionals exempt under the FLSA. The appeals court also held that trainers exercise sufficient discretion to meet the "discretion" prong of professional exemptions. Review denied, Mar. 20, 2000.

REVIEW REQUESTED

98-1658: ***Helms v. Picard***, 151 F.3d 347 (5th Cir. 1999). Review is sought in a Fifth Circuit case which approved against a First Amendment establishment clause challenge a public school system's provision of special education services to children voluntarily enrolled in parochial schools. The services were provided on site by public school teachers who were paid in part by a religiously affiliated corporation and were permanently assigned to teach for full school days at one sectarian school. Filed, April 13, 1999.

98-1671: ***Picard v. Helms***, 151 F.3d 347 (5th Cir. 1999). Louisiana Attorney General has asked the High Court to uphold the instructional material program under Chapter 2 of Title I of the Elementary and Secondary Education Act of 1965 as implemented by the Jefferson Parish School System and the state statute permitting the provision of school books and other instructional materials to all Louisiana school children, including those attending private sectarian schools. Filed, April 13, 1999.

99-935: ***Chandler v. Siegelman***, 180 F.3d 1254 (11th Cir. 1999). High Court review is sought in Eleventh Circuit case which held that prayer which is genuinely student initiated and non-proselytizing does not violate the establishment clause even when it occurs in public school classrooms and at school-sponsored activities. The Eleventh Circuit viewed such prayer as private speech entitled to protection under the free exercise of religion and the free speech clauses. As such it could not be prohibited nor be subjected to time, place and manner restrictions beyond those applicable to other forms of student speech. Filed, Dec. 2, 1999.

99-1345: ***DiLoreto v. Board of Education of Downey Unified School Dist.***, 196 F.3d 958 (9th Cir. 1999). Review has been sought of Ninth Circuit ruling that public school did not violate the First Amendment protection of free speech by refusing to post Ten Commandments on school's athletic field fence which had been made available for commercial advertising. The Ninth Circuit held that the fence was a nonpublic forum from which the school could exclude religious messages. Filed, Feb. 7, 2000.

99-1362: ***Killino v. Riverside School Dist.***, (3rd Cir. Aug. 16, 1999). Student has requested that Supreme Court review decision by Third Circuit that affirmed grant of summary judgment to the school district in a case brought under Section 504, the Americans with Disabilities Act and section 1983. The court said that summary judgment was proper as to the 504 claim because student had refused to submit to mandatory evaluation to determine her eligibility for special education under that statute. The court also found that the student had failed to raise any genuine issue of material fact as to her other claims. Filed, Feb. 14, 2000.

99-1370: ***New York v. Yonkers Board of Education***, 197 F.3d 41 (2d Cir. 1999). New York Attorney General has requested that the High Court review decision by the Second Circuit that held that district court properly apportioned ongoing costs of prior remedial measures between the state and the city where city school district had achieved full integration. Second Circuit so ruled under the Fourteenth Amendment and the Equal Educational Opportunities Act (EEOA), saying the state had been aware of the prior segregation by the city's public school but failed to take corrective action. New York Attorney General has raised the issue of whether Congress made clear its intent to abrogate states' Eleventh Amendment immunity under the EEOA. Filed, February 14, 2000.

99-1428: ***Westendorp v. Ventura***, 187 F.3d 829 (8th Cir. 1999). Disabled student has sought Supreme Court review of Eighth Circuit decision that plaintiffs were not prevailing parties within the meaning of 42 U.S.C. § 1988 because Supreme Court decision in *Agostini v. Felton*, 521 U.S. 203 (1997), not the plaintiffs' lawsuit, caused the state to change its rule against providing on site services at religious schools. Filed, Feb. 28, 2000.

99-1477: ***Hearn v. Savannah, Ga. Board of Public Education***, 191 F.3d 1329 (11th Cir. 1999). Former teacher has asked the High Court to review Eleventh Circuit's determination that school district did not violate her contract or school board policy by discharging her for refusal to take a drug test after marijuana was found in her car that was parked on school property. Although the policy required a search warrant or consent prior to searches of employees' personal property, the policy did not apply because the dog sniff of cars on the school campus was a law enforcement activity. The search of the employee's car did not violate the Fourth Amendment because the dog's alerting to the car provided the necessary reasonable suspicion and probable cause. Filed, Mar. 7, 2000.

NSBA **Case Notes** and **Supreme Court summaries** are available on-line at http://www.nsba.org/cosa/LawLibrary/whatsnew

Chairman's Notes

MEMBERS ELECT NEW OFFICERS & DIRECTORS/ COMMITTEES APPOINTED

At the April 1, 2000 meeting of the Council in Orlando, the following new officers and directors were elected: Chairman—Martin Semple (Colorado); First Vice Chairman—Cynthia Lutz Kelly (Kansas); Second Vice Chairman—Margaret A. Chidester (California); and Secretary—Nancy Fredman Krent (Illinois). Janet Little Horton (Texas), Ned N. Julian (Florida) and Jay Worona (New York) were elected as directors for their first two-year term. David A. Farmelo (New York), D. Patrick Lacy (Virginia), Rudy Moore, Jr. (Arkansas), Thomas W. Pickrell (Arizona), and Stephen S. Russell (Pennsylvania) were elected as directors for a second two-year term. Samuel S. Harben (Georgia) was appointed for one year to complete the term of Janice F. Doggett (Montana) who resigned from the Council board. Contact information for all Council board members is included on the Council's Web site at http://www.nsba.org/cosa/about/board.htm

The following individuals have been appointed to chair Council committees for the 2000-01 program year:

Nominating Committee — James T. Maatsch
School Law Seminar Programming — Cynthia Lutz Kelly
2001 Advocacy Seminar — Deryl W. Wynn
Membership & State Council Relations — Anthony G. Scariano
Urban Law — Giselle S. Johnson
Publications — Thomas W. Pickrell
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continued on page 16

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Make plans now to attend the Council's 2000 Advocacy Seminar, October 12-14, 2000 at the Wigwam Resort near Phoenix, Arizona. On the first evening, the program agenda includes such topics as responding to student threats, current issues involving students with disabilities, FERPA problems, and board member e-mail issues. On Friday, October 13, sessions will cover issues such as zero tolerance policies, preventing school violence, religious groups at school and prayer at school events, special ed and high stakes testing, employee rights and privacy, and school fundraising, licensing, advertising and foundations. The seminar concludes on Saturday with discussion of race in student assignments, alternative dispute resolution for handling teacher grievances and issues related to medically fragile children. The Council's Fourth Annual Golf Tournament will be held immediately following the seminar. You can register for the seminar and make your hotel reservations now by visiting the Council's Web site at http://www.nsba.org/cosa/pubsem/brochure.htm. Seminar brochures will be mailed in the early summer.

FUTURE MEETING DATES

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- 2001 School Law Seminar—San Diego, California—March 22-24, 2001
- 2002 School Law Seminar—New Orleans, Louisiana—April 4-6, 2002

NEW PUBLICATIONS

In addition to Part II of *A School Law Primer* (see ad on page 15), the Council has available two new publication updates — *Desk Reference on Significant Supreme Court Cases Affecting Public Schools* and *Student to Student Sexual Harassment: A Legal Guide for Schools.*

The desk reference, a revision of an earlier publication, includes brief summaries of Supreme Court cases through the 1998 Term. The Council's new publication on peer sexual harassment updates its 1998 publication on this topic to include discussion of the latest relevant Supreme Court cases. More information about these publications can be found on the Council's Web site at http://www.nsba.org/cosa/PubSem/index.htm or may be ordered by calling 1-800-706-6722.

I look forward to serving as your chairman this year

Martin Semple
Chairman

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